IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 863 OF 2001

Tukaram Maruti Parit
Prisoner No.1447,
Kochapur Central Prison
Kalamba, Kolhapur – 416007
(R/o. Asurle, Taluka:Panhala
Dist: Kolhapur) ...Appellant
Vs.
The State of Maharashtra ...Respondent

Mr.Nitin Paradhan for Appellant
Ms. P.H.Kantharia, A.P.P for the State

CORAM: SHRI J.N. PATEL &
SMT. ROSHAN DALVI, JJ.
DATED: 19TH JUNE, 2006

JUDGMENT (PER SMT. ROSHAN DALVI, J.)

1. The Appellant/accused has been charged and convicted for an offence of murder committed on 5th September, 1995 at 22.30 hours in village Asurle, Tal: Panhala, District Kolhapur behind Shiv Shakti Mandal by causing the death of the complainant's father Dagadu Raghu Morbale punishable under Section 302 of the Indian Penal Code. The accused is also charged and convicted for using a country made pistol

without license and shortening the barrel of a firearm at the aforesaid date, time and place in contravention of Section 5 of the Arms Act, 1959 punishable under Section 25(1)(a) and (b) of the Arms Act.

2. The accused has been sentenced to imprisonment for life for the offence punishable under Section 302 and to suffer Rigorous Imprisonment for 6 months with a fine of Rs.200/- for the offence punishable under Section 25(1)(b) of the Arms Act and to suffer Rigorous Imprisonment for 3 years and to pay a fine of rs.200/- for the offence punishable under Section 25(1)(a) of the Arms Act. The accused has appealed from the aforesaid sentences.

3. The accused has been acquitted of the offence punishable under Section 135 r.w. Section 37 of the Bombay Police Act from which there is no appeal by the State.

4. The accused was known to the deceased. It is alleged that the deceased had a illicit relationship with the wife of the accused. The incident took place on 5th September, 1995 which was one of the days during Ganpati festival. The place of the incident is at the Pendol where Ganpati Idol was installed. The time of the incident was during the Ganpati festival.

5. It is the prosecution case that the deceased as well as his son, the complainant, were present behind the pendol, at about 22.30 hours on 5th September, 1995. The accused came there. There was a talk between the son of the deceased and the accused relating to the decoration of the pendol. Since the deceased was behind the pendol the accused is stated to have gone behind the pendol. The son of the deceased could see them though he was on the front side. Whilst he was near the pandol he heard the gun shot. He looked in that direction. The accused and the deceased were close to each other and deceased was injured. Blood was flowing from his chest. The accused had pistol in his hand. The son of the deceased went near the deceased and the accused and seized the pistol from the hand of the accused. The accused ran away. He thereafter made himself scarce. He has admitted that he was out of the village for a long period of time after date of the incident in reply to question no.9 in his 313 statement.

6. It is upon this incident that the prosecution case of murder is based. It has been the prosecution case that with the intention of committing murder of the father of the complainant, the accused came to the pendol at that hour when most of the persons had left. Yet there were some

persons near the pendol. The case of the complainant (P.W.No.1) has been corroborated by 3 other witnesses, P.W.2, P.W.10 and P.W.11 with regard to the incident. Their case has not been diluted in the cross examination at all except in their evidence relating to the hearing of the gun shot. P.W.9 the casualty medical officer recorded the injuries suffered by the deceased upon the admission.

7. Since the deceased was seriously injured he was shifted to the Civil Hospital at Kolhapur. He was in the ICCU initially. He was operated on the next day i.e. On 6th September, 1995. Certain pellets which were embedded in his chest cavity were removed. He was then discharged. One Doctor Jagdale (P.W.14) performed operation and has deposed about the condition of the deceased immediately after the incident.

8. The deceased succumbed to his injury after a long period of about a year. Within that time he under went 3 other surgeries through another Doctor (P.W.12). He is stated to have suffered renal failure due to chronic infection leading to septicaemia.

9. The deceased is stated to have made a Dying Declaration which was recorded by the S.E.M. (P.W.8) in

presence of the Doctor (P.W.13). However, the cause of death of the deceased has not been brought on record by a Postmortem report. It is contended on behalf of the appellant/accused that the dying declaration cannot be looked into as the declaration made by the deceased is too remote from his death which took place after a long period of time and for reasons not brought on record. That part of the evidence would therefore, have to be discarded.

10. The criminal machinery was set in motion by the telephone call received by the Head Constable at Panhala Police Station at about the time of the incident itself. An entry was made in the station diary to that effect. The P.S.I. Attached to Panhala police station (P.W.15) attended the Civil hospital, Kolhapur and saw the injured in the ICCU. He met the complainant, the son of the injured and recorded his complaint. It is contended on behalf of the appellant that the written complaint dated 9th September, 1995 was recorded after a gross delay of 4 days. However, that is not the first information report in this case. The first information report was received telephonically. The investigation commenced immediately. The clothes of the deceased were recovered under a panchanama as deposed by the panch P.W.3 on 6th September, 1995, soon after the incident. The deceased was operated on 6th September, 1995

itself. The PSI attended the hospital immediately after receiving the first information report at 10.30 p.m. On 5th September, 1995 itself. The registration of the case is therefore, not delayed as contended.

11. It is not in dispute that the deceased was known to the accused and that the accused was present at the time of the incident in the pendol. It is also not in dispute that the deceased suffered serious and fatal injuries to which he ultimately succumbed albeit after a sufficiently long period of time.

12. It has been the case of the accused put to the complainant (P.W.1) that the pistol was in the hand of the deceased and the accused held his hand. It is further case put to P.W.1 that to eliminate the accused, P.W.1 and his father had planned to shoot him with the pistol and so the pistol remained with P.W.1. From the evidence, the case of the accused that appeared to emerge was that in the scuffle that ensued between the deceased and the accused, because the deceased wanted to eliminate the accused, the gun shot was fired. It is therefore, the contention of the accused that the case does not fall within the ambit of Section 302 of the Indian Penal Code and that, at best, it would fall within the purview of Section 304 (II) of the Indian

Penal Code.

13. However, the statement of the accused recorded under Section 313 Cr.P.C. In reply to questions 6 and 24 merely shows a denial of the accused that the pistol was in his hand and that the complainant might have produced it.

14. Consequently to test such a defence and to see the purview of the case of the prosecution, the evidence of the complainant with regard to the incident, which is corroborated by P.W.2, 10 and 11 would have been to be seen.

15. The evidence of the complainant is that at about 10.00 p.m the presence of the visitors in the pendol was reduced. The accused then came to the pendol near the complainant. They had a talk. There were 8 to 10 visitors. The pendol was lighted. The deceased was standing on the road behind the pendol. The accused went in that direction. The complainant heard a gun shot. The complainant immediately looked to that side he could see the accused with a pistol in his hand. The accused was coming running in the direction where the complainant was standing. His father was following the accused shouting to catch him. His father pulled the accused and caught him and fell down. He

and others rushed to that place. He *"took out"* the pistol from the hand of the accused. His father's shirt was wet with blood. Whilst he diverted his attention to his injured father, the accused fled. His father was removed to the hospital.

16. He has stated much the same in his complaint registered on 9th September, 1995. This evidence has been corroborated by other witnesses who were present. P.W.11 however, has deposed that the pistol was found on the ground. The pistol was seized by the police. It has been produced as an article and identified by the complainant and other witnesses. The evidence of the complainant corroborated by the other witnesses therefore, deserves acceptance. The case put to P.W.1, which finds no place in the statement of the accused despite being asked what he would want to say, deserves rejection.

17. During the course of investigation the house of the accused was searched. 4 live cartridges and a knife marked articles 3 to 7 in evidence came to be recovered. This supports to the case of prosecution that it was the accused who had the pistol in his hand and who used it to injure the deceased.

18. The evidence of P.W.10 speak of the curtain behind the pendol. It shows that from the place where he was, he could see the front side as well as rear side of the pendol. His evidence also shows the corroboration of the entire incident as also the fact of the accused having the pistol and the complainant seizing it from his hand before the accused fled. The evidence of the P.W.11 that the pistol had fallen down and was picked up by the complainant when the accused ran away is materially the same in the case of Bhagirath Vs. State of Haryana , AIR 1997 , SC 234, the pistol shot fired by the accused at a close range which resulted in the death of the victim sustained a conviction under Section 302 of the Indian Penal Code. The evidence of the witnesses to that effect corroborated by medical evidence was believed despite some contradictions in their depositions.

19. The fact that the accused came with the pistol and used it to injure the deceased is, therefore, clear. The intention of the accused to cause the death of the deceased, therefore, follows as a matter of corollary.

20. This is to be viewed in view of the fact that the accused was absconding for a period of about 5 years from the date of the incident. That would not have been the case had the tables been turned and the deceased and his son, the

complainant planned to eliminate the accused. The reply of the accused to question 9 in his 313 statement shows the admission of the accused that he made himself scarce. The accused however, stated that he was away from the village as he was in fear that the deceased had illicit intimacy with his wife. If that was the reason for staying away from the village, his presence at the scene of the incident on 5th September, 1995 is unexplicable.

21. The evidence of 3 medical officers point to the fatal nature of injuries sustained by the deceased. The Casualty Medical Officer in the Civil Hospital, Kolhapur has shown the injuries suffered by the deceased in the medical examination performed by him has reflected in the certificate dated 5th September, 1995 proved through him. This includes central wound with a multiple pellet injuries surrounded by burns and a fracture of a sternum with blood and bubbles through the wound with absence of air entry.

22. Further the evidence of Dr. Jagdale (P.W.14) details the condition of the deceased on medical examination. Upon a history of gun shot injury for which the deceased was admitted to the hospital the medical officer found the aforesaid injuries. He has deposed that there was leakage of air from the right side lung and tenderness over the

abdomen of the injured. His evidence further shows that upon the surgery performed on the deceased for removal of the cartridge and 3 small pellets he found the rib bone fracture, injury to pleura, 2 small perforations on the stomach, 3 punch injuries on the liver due to cartridge and the pellets. His deposition as an expert witness shows that the injuries suffered by the deceased are sufficient in the ordinary course of nature to cause death. Some of the pellets removed and some were embedded deep inside the liver, in the chest wall and retro-peritoneal-space. The cross examination of P.W.14 shows that removal of the deeply embedded pellets would have caused danger to his life and hence, they were not removed.

23. Since the deceased survived for a long period of time before finally expiring, the prosecution has examined the personal doctor of the deceased who later treated him. P.W.12 the said Doctor performed 3 operations upon the deceased. His evidence shows that the deceased was breathing fast and had discomfort in chest and was discharging sinus from the chest wall. His evidence further shows that the bullets were embedded in the right side of lung and in the chest of the deceased. He examined the deceased on 27th December 1995, 4th January, 1996 and 20th February, 1996, and 29th June, 1996. The deceased had pus

formation in his chest wound and chest pain and fever. His symptoms ended in renal failure.

24. The extent of the injuries caused by the gun shot in the chest of the deceased imputes clear knowledge upon the accused that such injury would be sufficient to cause the death of the deceased.

25. After full and correctly appreciating such evidence the learned trial Judge has imputed knowledge as well as intention upon the accused. It is impossible for us to conclude otherwise with regard to both these aspects upon the pieces of evidence – relating to the use of the pistol by the accused and the injuries caused to the deceased.

26. The contention on behalf of the appellant that the intention to cause the death of the deceased could not be imputed upon the accused would have to be rejected. Similarly the lack of knowledge that as could result in the death of the deceased cannot be accepted.

27. The conviction of the accused upon the facts of this case is therefore correct. All that is required to be seen is whether upon the evidence in this case an offence punishable under Section 302 alone is made out.

28. Mr. Pradhan argued that the case falls within Section 304(II) of the Indian Penal Code. The cases falling within the umbrella of Section 304(I) invariably have an intervener in a quarrel or scuffle who receives a fatal injury. In the case of Abani K. Debnath Vs. State of Tripura reported in 2006 Cr. L.J. 314 in a quarrel between 2 persons, deceased not being one of them, the deceased was actually an intervener to save one of those fighting persons. The incident appeared on the spur of the moment. Only one blow was dealt. The deceased succumbed to his injury after 7 days. It was held that the case squarely fell within Section 304 (II) and Rigorous Imprisonment of 5 years was awarded.

29. Mr. Pradhan drew our attention to the judgment in the case of Munna Kumar Vs. State of Bihar reported in (2005) 12 Supreme Court Cases, 209. That was the case in which a bullet injury resulted in hospitalisation and the later death of the victim could not be related to the bullet injury on his head for want of the Postmortem report. It was held that the best evidence was the Postmortem certificate, which would have alone shown the death caused as a result of the gun shot. In this case also the postmortem report of the death, which took place about a year after the incident, is not produced, though the fact that the deceased underwent

3 surgeries is proved by the evidence of Dr. Jagdale, P.W.14. However, it must be accepted that the deceased did not succumb to his injuries immediately or within a very short period. His dying declaration also therefore, cannot be considered. No postmortem report after deceased was obtained. The fact that he died only because of the gunshot injury and on account of no other reason is not clearly shown. However, the accused fired a single act of gunshot from close quarters with his pistol. The gun shot was not fired in any altercation between the deceased and the accused. That is not even the case of the accused. The gun shot is therefore, not by way of a mistake in handling the pistol by the accused. The very presence of the accused at the time of the incident and the place of the incident coupled with the fact that the pistol was seized from his hand by the complainant and handed over to the police shows the intention to use the weapon as it was used by the accused. The case in which the conviction was made under Section 304(II) therefore, stand out as a contrast to this case. The in-resistible conclusion is that the conviction must be made under Section 304(I).

30. Consequently though the reasoning of the learned Ad hoc Additional Sessions Judge, Kolhapur cannot be faulted, only the conviction of the accused under Section 302 of the

Indian Penal Code needs to be altered. Consequently the sentence of imprisonment for life cannot stand. It requires to be replaced by the sentence of Rigorous Imprisonment for 10 years.

31. The conviction of the accused for using the fire arm which is a country made pistol without license is seen to be in contravention of Section 5 of the Arms Act, 1959 resulting in the commission of the offence punishable under Section 25(1)(a) of the said Act. The conviction and the sentence under the said Section is therefore, upheld.

32. The conviction of the accused under Section 6 of the Arms Act as charged is not borne out by the evidence on record. Consequently there is no offence seen to be committed and punishable under Section 25(1)(b) of the Arms Act and the conviction and sentence under that Section is set aside.

33. Consequently the appellant/accused for having committed the offence under Section 302 of the Indian Penal Code is quashed and set aside. The appellant/accused is found guilty of having committed offence under Section 304 (I) and is convicted and sentenced to suffer Rigorous Imprisonment for 10 years. The accused shall pay a fine of

Rs.2000/- and in default thereof undergo further imprisonment for 1 year.

34. The conviction and sentence of the appellant/accused for having committed the offence under Section 5 of the Arms Act punishable under Section 25(1)(a) of the said Act is maintained.

35. The conviction and sentence of the appellant/accused for having committed the offence under Section 6 of the Arms Act punishable under Section 25(1)(b) of the said Act is quashed and set aside.

36. The appeal is disposed of accordingly.

(SMT.ROSHAN DALVI, J.) **(SHRI. J.N.PATEL,J)**